BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
ENVIRONMENTAL LAW AND POLICY CENTER, on behalf of PRAIRIE RIVERS NETWORK and SIERRA CLUB, ILLINOIS CHAPTER,	)	
	)	
Intervenor,	)	
	)	
vs.	)	**PCB No. 10-61 & 11-2**
	)	**(Water - Enforcement)**
FREEMAN UNITED COAL MINING COMPANY, LLC, a Delaware limited liability company, and SPRINGFIELD COAL COMPANY, LLC, a Delaware limited liability company,	)	
	)	
Respondents.	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on June 18, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, PEOPLE'S RESPONSE TO FREEMAN UNITED COAL MINING COMPANY'S MOTION FOR SUMMARY JUDGMENT, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____
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CERTIFICATE OF SERVICE

I hereby certify that I did on June 18, 2012, cause to be served by United States Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instrument entitled NOTICE OF ELECTRONIC FILING and PEOPLE'S RESPONSE TO FREEMAN UNITED COAL MINING COMPANY'S MOTION FOR SUMMARY JUDGMENT upon the Respondents listed on the Service List.

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ENVIRONMENTAL LAW AND POLICY CENTER, on behalf of PRAIRIE RIVERS NETWORK and SIERRA CLUB, ILLINOIS CHAPTER,	)	
	)	
Intervenor,	)	
	)	
v.	)	**PCB Nos. 2010-061 & 2011-002 (Water-Enforcement)**
	)	
FREEMAN UNITED COAL MINING COMPANY, LLC, a Delaware limited liability company, and SPRINGFIELD COAL COMPANY, LLC, a Delaware limited liability company,	)	
	)	
Respondents.	)	

PEOPLE'S RESPONSE TO FREEMAN UNITED COAL MINING COMPANY'S MOTION FOR SUMMARY JUDGMENT

The Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, respectfully responds to the Motion for Summary Judgment filed by FREEMAN UNITED COAL MINING COMPANY, LLC, and states as follows:

Introduction

On April 30, 2012 the Attorney General's Office received service of the pleading in which Freeman United responded to the State's Motion for Partial Summary Judgment. This pleading also moves for summary judgment on Counts I and III. With the agreement of counsel for Freeman United, the Complainant seeks leave to file this response to the summary judgment

request by June 18, 2012.

Freeman United essentially seeks the adjudication of certain affirmative defenses asserted in its Answer to the State's Complaint filed on July 23, 2010. Complainant timely responded and objected to the affirmative defenses on July 29, 2010. The particular defenses reiterated in the Respondent's Motion for Summary Judgment and the State's responses thereto are set forth below to provide the context for the Board's consideration.

It is well settled that an affirmative defense is a response to a claim which attacks the legal right to bring an action, as opposed to attacking the truth of claim. See *Worner Agency v. Doyle*, 121 Ill. App. 3d 219, 221 (4th Dist. 1984) (where the pleading does not admit the opposing party's claim and instead attacks the sufficiency of that claim, it is not an affirmative defense). In a properly pleaded affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true." *People v. Community Landfill Co.*, PCB 97-193 (Aug. 6, 1998) slip op. at 3, quoting Black's Law Dictionary. Stated another way, a valid affirmative defense gives color to complainant's claim, but then asserts a new matter that defeats an apparent right of complainant. See *Condon v. American Telephone and Telegraph Co.*, 210 Ill. App. 3d 701 (2nd Dist. 1991), citing *Doyle*, 121 Ill. App. 3d at 222.

It is also well settled that the Board is an administrative agency created by the legislature and statutorily empowered by the legislature. "An administrative agency, such as the Pollution Control Board, has no greater powers than those conferred upon it by the legislative enactment creating it." *Lombard v. Pollution Control Board*, 66 Ill. 2d 503, 506 (1977). The Board must be mindful of the inherent limitations of its jurisdiction. The term "jurisdiction" with respect to an

administrative agency has three aspects: 1) personal jurisdiction, which is the agency's authority over the parties involved in the proceedings; 2) subject matter jurisdiction, which is the agency's power to hear and determine the general class of cases to which the particular case belongs; and 3) the scope of the agency's authority under a particular statute. See *Business & Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 243 (1989). It is the limited scope of its delegated authority that the Board must consider when confronted with affirmative defenses because the mere assertion of an equitable remedy does not empower the Board to exercise such powers.

The Board and the circuit court "do not have the same powers and are not coordinate tribunals." *Janson v. Illinois Pollution Control Board*, 69 Ill. App. 3d 324 (3rd Dist. 1979). "The Board has no authority to issue or enforce injunctive relief . . . or to punish for civil contempt." *Id.* at 328; see also *Landfill, Inc. v. Pollution Control Board*, 74 Ill. 2d 541, 551 (1978) (absent statutory authorization, the Board did not previously have the power to entertain an action in which a third party challenges a permit). "The Board lacks the authority to delineate the Agency's jurisdiction." *White Fence Farm, Inc. v. Land & Lakes Co.*, 99 Ill. App. 3d 234, 240 (4th Dist. 1981). "The grant of authority to conduct hearings upon complaints charging violations of the Act is merely a delegation of quasi-judicial powers to the Pollution Control Board incidental to its duty of administering the law. [citations omitted] The Board is limited in its jurisdiction, procedural due process is provided for, and the Board's decisions are subject to judicial review." *Meadowlark Farms v. Pollution Control Board*, 17 Ill. App. 3d 851, 856 (5th Dist. 1979). These delegated powers are limited in comparison with judicial authority. For instance, a circuit court could hold a municipal ordinance to be invalid or to order a municipality

to repeal such ordinance; the Board cannot. *Lake Forest v. Pollution Control Board*, 146 Ill. App. 3d 848, 854 (2nd Dist. 1986). Lastly, and perhaps most importantly, the Attorney General is a constitutional officer; neither the legislature nor the Board may limit the power of the Attorney General to take action. *People v. NL Industries*, 152 Ill. 2d 82 (1992).

Freeman United's First Affirmative Defense

"Complainant's claims are barred in whole or in part by the applicable statute of limitations and by the doctrine of laches." Freeman United's Answer at 19.

People's Response to First Affirmative Defense

> The Respondent contends that the claims "are barred in whole or in part by the applicable statute of limitations and by the doctrine of laches." However, the Respondent pleads no allegations of fact to which the Complainant must respond.
>
> The Complainant objects to the first contention because the Respondent fails to identify what state of limitations is purportedly "applicable" to this matter. The Respondent's contention is both legally and factually insufficient.
>
> The Complainant objects to the second contention because the Respondent fails to describe any alleged delay in bringing this enforcement case, to explain how any such delay may have been "unreasonable" in light of the circumstances, and to assert that the Respondent is somehow "prejudiced" by any such delay. *Laches* is an equitable doctrine which precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party. *People ex rel. Daley v. Strayhorn* (1988), 121 Ill.2d 470, 482. In order to properly plead this affirmative defense, a litigant must allege the two elements necessary for a finding of *laches*: 1) lack of diligence by the party asserting the claim, and 2) prejudice to the opposing party resulting from the delay. *Tully v. State* (1991), 143 Ill.2d 425, 432. As a creature of statute, the Board has no explicit grant of equitable powers and cannot properly entertain such a defense. This second contention is also both legally and factually insufficient.

Complainant's Response to Freeman United's Answer at 3-4.

Freeman United's Second Affirmative Defense

> The People's claims should be dismissed because Freeman United entered into a Compliance Commitment Agreement with IEPA pursuant to 415 ILCS 5/31(a) after receiving a Notice of Violation from IEPA on March 11, 2005. On June 16, 2005, Freeman United and IEPA entered into a two-year Compliance Commitment Agreement

regarding alleged effluent violations at the Industry Mine. Freeman United fully complied with the terms of the Compliance Commitment Agreement and believed that it was taking all actions IEPA deemed to be necessary to bring the Industry Mine into compliance with the Illinois Environmental Protection Act. Freeman United also sought to extend the Compliance Commitment Agreement in 2007. Although Freeman United's initial request to extend the Compliance Commitment Agreement was rejected by IEPA, on August 30, 2007, Freeman United submitted a revised proposal for extending the Compliance Commitment Agreement. IEPA never responded to Freeman United's revised proposal for extending the Compliance Commitment Agreement. Pursuant to 415 ILCS 5/31(a)(9), IEPA's failure to respond to the August 30, 2007, revised proposal is deemed an acceptance by IEPA of the proposed Compliance Commitment Agreement.

Pursuant to 415 ILCS 5/31(a)(10), IEPA was prohibited from referring Freeman United's alleged violations to the Illinois Attorney General because Freeman United complied with the terms of its Compliance Commitment Agreement.

Freeman United's Answer at 19.

People's Response to Second Affirmative Defense

The Respondent pleads herein allegations of fact to which the Complainant will respond directly: The Complainant admits that the Illinois EPA issued a notice of violation to Freeman United in March 2005. The Complainant admits that the Illinois EPA accepted a compliance commitment agreement on June 16, 2005. The Complainant admits that the Respondent fully complied with the terms of the compliance commitment agreement; however, the Complainant is without knowledge or information to admit or deny that Freeman United "*believed* that it was taking all actions IEPA deemed to be necessary. . . ." The Complainant admits that the Respondent sought to extend the compliance commitment agreement. The Complainant admits that the Illinois EPA rejected the initial request to extend the compliance commitment agreement. The Complainant admits that on August 30, 2007 Freeman United submitted a revised proposal for extending the compliance commitment agreement. The Complainant admits that the Illinois EPA did not respond in writing to the August 30, 2007 revised proposal. The two remaining statements regarding the application of provisions of Section 31(a) of the Act are legal conclusions and merit no response.

Complainant's Response to Freeman United's Answer at 4.

Freeman United's Third Affirmative Defense

The People and IEPA have failed to follow the required procedures of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1, *et seq.* (2008). IEPA did not provide Freeman United with a notice of violation, as required by 415 ILCS 5/31(a)(l),

> for all of the alleged violations contained in this complaint and therefore did not give Freeman United the opportunity to respond to IEPA regarding the alleged violations.

Freeman United's Answer at 20.

People's Response to Third Affirmative Defense

"The Respondent's contentions herein are legal conclusions and merit no response."

Complainant's Response to Freeman United's Answer at 4.

Freeman United's Seventh Affirmative Defense

"The People's claims are barred by the doctrine of waiver." Freeman United's Answer at 20.

People's Response to Seventh Affirmative Defense

> The Respondent contends that the claims "are barred by the doctrine of waiver." Waiver is an affirmative defense which is itself waived if not specifically pleaded. *Dragon Construction, Inc. v. Parkway Bank & Trust*, 287 Ill. App. 3d 29, 34 (1st Dist. 1997). However, the Respondent pleads no allegations of fact to which the Complainant must respond.

Complainant's Response to Freeman United's Answer at 5.

Freeman United's Eighth Affirmative Defense

"The People's claims are barred by the doctrine of estoppel." Freeman United's Answer at 20.

People's Response to Eighth Affirmative Defense

> The Respondent contends that the claims "are barred by the doctrine of estoppel." Estoppel is an affirmative defense and facts asserting it must be pleaded and proved by the party relying on it by clear, precise and unequivocal evidence. *Forest Inv. Corp. v. Chaplin*, 55 Ill. App. 3d 429, 434 (4th Dist. 1965). However, the Respondent pleads no allegations of fact to which the Complainant must respond.

Complainant's Response to Freeman United's Answer at 5.

The Respondent's motion for summary judgment relies completely upon these legal defenses, and for the following reasons should be denied as a matter of law.

Argument

Freeman United provides a straightforward contention in its combined[1] motion and response to the State's Motion for Partial Summary Judgment: "Because the undisputed facts establish the requisite elements of the specific affirmative defenses asserted by Freeman United, the Board should deny the State's Motion and instead grant summary judgment in favor of Freeman United on Counts I and III of the State's complaint." Motion at 6, footnote omitted. As a movant for summary judgment based upon affirmative defenses, Freeman United must establish such defenses through admissible evidence; the Respondent tenders the following documentary exhibits:

Exhibit 1 is the affidavit of Thomas J Austin dated April 27, 2012;

Exhibit 1A is a violation notice dated March 11, 2005;

Exhibit 1B is the violation notice response dated May 19, 2005;

Exhibit 1C is the Compliance Commitment Agreement accepted on June 16, 2005;

Exhibit 1D is a manganese case study [undated];

Exhibit 1E is a Compliance Commitment Agreement status report dated March 30, 2007;

Exhibit 1F is an Illinois EPA rejection letter dated July 13, 2007;

Exhibit 1G is a permit transfer request dated August 14, 2007;

---

[1] The Board's procedural rules at Section 101.500 (generally applicable to all motions) and 101.516 (specifically applicable to motions for summary judgment) neither prohibit nor allow combined motions and responses. While there may be some overlap, the State will herein respond to the arguments in support of the Respondent's request for summary judgment and will refrain from directly replying to any arguments in opposition to the Complainant's request for summary judgment.

Exhibit 1H is a reply (to the Illinois EPA rejection letter) dated August 30, 2007;

Exhibit 1I is a Springfield Coal letter dated April 21, 2010;

Exhibit 1J is a group of excerpts from a draft mining document dated June 19, 1979;

Exhibit 1K is a group of excerpts from a mining application dated July 9, 1979;

Exhibit 1L is a group of excerpts from a mining application dated July 1, 1992;

Exhibit 1M is a compilation of analytical data relating to stream samples; and

Exhibit 2 is the Board's enforcement order dated February 7, 1980.

In the Motion for Partial Summary Judgment filed on March 6, 2012 the People described the record of decision as consisting of the Complaint, the Answers thereto by the Respondents, and the affidavit of Larry Crislip. State's Motion at 4. The admissibility and relevance of these additional exhibits will be addressed where relevant in the following sections, but we have already expressed concerns in our Motion as to the procedural posture of the alleged defenses and the status of the factual record.

The People did not (contrary to Freeman United's contention) ask the Board to "ignore" these affirmative defenses when evaluating the State's Motion. While the purported defenses are subject to valid criticisms for lacking a legal basis or being pleaded without sufficient facts, or both, the record for decision does include these assertions of a bar to liability and the Board must consider these claims. The State's Motion does argue that the mere assertion of affirmative defenses does not create a disputed material fact, especially where the Complainant's responses challenge the factual sufficiency and legal validity of such purported defenses. However, the State's Motion does not ask the Board to "ignore" these affirmative defenses; the Respondent criticizes [at 6 - 7] the State for purportedly making such a request and cites to pages 9 and 10 of

the State's Motion but the word "ignore" is not used and our argument does not provide any support for such a representation. Clearly, the Board cannot *ignore* any part of the record and, if supported by admissible and undisputed facts, an affirmative defense may be a bar to *liability* in the adjudication of summary judgment.

There is no applicable Statute of Limitations

There is no statute of limitations within the Environmental Protection Act and no court has imposed any other statute of limitations upon the State in any enforcement action brought under the Environmental Protection Act. The Respondent's first defense fails to identify any particular statutory provision but its arguments in the combined motion and response rely upon Section 31 of the Act. However, Freeman United does not actually argue that any provision of Section 31 functions as a limitation upon the *filing* of an enforcement proceeding before the Board.

Section 31(a)(1) provides that "within 180 days of becoming aware of an alleged violation of the Act or any rule adopted under the Act . . . the Agency shall issue and serve, by certified mail, upon the person complained against a written notice informing that person that the Agency has evidence of the alleged violation." This initial provision makes no distinction between those violations that are but one overt act and those violations that are continuous in nature. This provision cannot be reasonably construed to be a statue of limitations.

Section 31(a) does not govern or fix the time by which the Illinois EPA must seek a formal enforcement action. The 180-day provision governs only the Illinois EPA's issuance of a violation notice, not the time by which the Illinois EPA must refer violations or file a complaint. The procedures set forth in Section 31(a) therefore do not bear resemblance to the procedures

typically scrutinized by courts in regard to statutes of limitation or jurisdictional concerns.

If Section 31 were construed as a statute of limitations, it would directly affect the ability of the Illinois EPA to assert public rights afforded by a remedial statute. Illinois courts have recognized that statutes of limitations are inapplicable against the State where public rights are asserted. See, e.g., *County of Cook v. Chicago Magnet Wire Corporation*, 152 Ill. App. 3d 726 (1st Dist. 1987); *Pielet Bros. Trading, Inc. v. Pollution Control Board*, 110 Ill. App. 3d 752 (5th Dist. 1982). The Supreme Court has articulated the issue of governmental immunity as to any statute of limitations: "In accord with the rationale, the practice in Illinois has been to determine whether the right which the plaintiff governmental unit seeks to assert is in fact a right belonging to the general public, or whether it belongs only to the government or to some small and distinct subsection of the public at large." *City of Shelbyville v. Shelbyville Restorium, Inc.*, (1983) 96 Ill. 2d 457, 462. The Illinois Constitution declares the State's public policy is to insure a healthful environment and guarantees the right of a healthful environment to each citizen. The Attorney General is asserting a public right by taking enforcement actions to restrain environmental violations and to collect civil penalties for such violations. IL Const. Art. XI §§ 1 & 2. Freeman United's notions regarding the application of some statutory provision as any limitation on environmental enforcement by the Attorney General are in direct opposition to public policy.

Freeman United fails to confront the continuing nature of the violations at the Industry Mine. The Complaint alleges violations beginning in January 2004; the Crislip affidavit verifies these reported effluent violations as well as additional violations occurring subsequently to the filing of the Complaint. The continuous violations doctrine is frequently encountered as an exception to the general rule of accrual for statutes of limitations. The doctrine recognizes that

the period of accrual can essentially be tolled, such that the limitations period is either extended or begins anew for that period during which the violation continues. Illinois courts have consistently held that the statute of limitations for actions as to continuous acts or injuries only begins to run upon the date of the last wrongful act. "Where a tort involves a continuing or repeated injury, however, the statute of limitations does not begin to run until the date of the last injury or when the tortious act cease." *Hyron Waste Management Services, Inc. v. The City of Chicago*, 214 Ill. App. 3d 757, 763 (1st Dist.1991), citing *City of Rock Falls v. Chicago Title & Trust Co.*, 13 Ill. App. 3d. 359, 364 (3rd Dist. 1973). "Since the alleged deprivation is of a continuing nature, the action . . . is obviously not time barred." *Hyron Waste Management Services*, 214 Ill. App. 3d at 763.

The concept of continuing violations is not foreign to the enforcement scheme envisioned by the Act. Section 42(a) of the Act expressly recognizes that any person found in violation of the Act or Board regulations shall be liable to a civil penalty based on the initial violation as well as an additional penalty for each day in which the violation continues. Where a court or the Board is free to impose penalties based on continuous violations, clearly the Illinois EPA should be able to pursue enforcement of continuing violations in the pre-enforcement process under Section 31.

Lastly, the Board has already held that Section 31 is not a statute of limitations, but an administrative tool that ensures potential violators have an opportunity to negotiate an alleged violation with the Agency prior to initiation of formal enforcement proceedings. *People v. Eagle-Picher-Boge, L.L.C.* (July 22, 1999), PCB 99-152, slip op. at 6. There is no statute of limitations that applies to State enforcement actions brought pursuant to Section 31 of the Act. *Pielet Bros.*

Trading, Inc. v. Pollution Control Board, 110 Ill. App. 3d 752, 758 (5th Dist. 1982); *People v. American Disposal Co. and Consolidated Rail Corp.* (May 18, 2000), PCB 00-67, slip op. at 2-3.

The first part of the First Affirmative Defense invoked but failed to identify a statute of limitations, a statutory remedy provided by the Legislature; the second part pertains to an equitable doctrine for which there is no authority in the Act.

The People's claims are not barred by the Doctrine of Laches

Laches is an equitable doctrine that bars relief where a defendant has been misled or prejudiced because of a plaintiff's delay in asserting a right. *Madigan ex rel. Department of Healthcare & Family Services v. Yballe*, 397 Ill. App. 3d 481, 493 (2nd Dist. 2009); City of Rochelle v. Suski, 206 Ill. App. 3d 497, 501 (2nd Dist. 1990). *Laches* is "grounded in the equitable notion that courts are reluctant to come to the aid of a party who has knowingly slept on his right to the detriment of the opposing party." *Tully v. State*, 143 Ill. 2d 425, 432 (1991). There are two principal elements of *laches*: "lack of due diligence by the party asserting the claim and prejudice to the opposing party." *Van Milligan v. Board of Fire and Police Commissioners*, 158 Ill. 2d 85, 89 (1994). Although *laches* as applied to public bodies is disfavored, it can apply under compelling circumstances even when the public body is operating in its governmental capacity. *Hickey v. Illinois Central Railroad Co.*, 35 Ill. 2d 427, 447-48 (1966) (citations omitted). The Supreme Court reaffirmed *Hickey* in *Van Milligan*, 158 Ill. 2d at 90-91.

Since the Agency and the Attorney General's Office are operating in a governmental capacity in prosecuting this case in order to protect the public's interest, Freeman United would have to show compelling circumstances for *laches* to apply. Nonetheless, courts have expressed a "consistent reluctance" to impose *laches* on a government entity. *City of Chicago v. Alessia*, 348

Ill. App. 3d 218, 228-29 (2004). There is also no reasonable basis to conclude that a detrimental reliance occurred. *Yballe*, 397 Ill. App. 3d at 494 (concluding that a *laches* defense was not supported because the defendant presented no allegation or evidence that the government entity took any affirmative act).

The Respondent here tries first to equate the Illinois EPA's awareness of the effluent exceedances that the Respondent had reported month after month with a lack of due diligence *on the part of the Illinois EPA*. The Board may, of course, consider the Respondent's own lack of due diligence in attempting to achieve compliance during this period of time. Through the DMRs, the Illinois EPA was indeed aware of permit noncompliance continuing through and beyond the sale of the mine in September 2007. Freeman United then argues that the five years between the March 2005 violation notice and the February 2010 complaint filing is an "unreasonable delay" that "clearly evidences a lack of diligence." Motion at 14. The Davis affidavit, however, shows that the Attorney General was independently informed of the NPDES permit violations in mid-December 2009 (prior to the January 2010 referral) and filed a complaint in mid-February. Since the first principal element of *laches* is the "lack of due diligence by the party asserting the claim" it is necessary to identify the party asserting the claim. This Complaint was brought in the name of the People of the State of Illinois by the Attorney General on her own motion and at the request of the Illinois EPA. The party asserting the claim is the Attorney General.

The second principal element of *laches* is "prejudice to the opposing party." The Respondent argues that it has been prejudiced by the unreasonable delay but the record it provides to support this argument (and the other affirmative defenses) consists merely of the

Austin affidavit. No prejudice is demonstrated by Mr Austin's statements. First, wearing his Freeman United hat: "I understood that once IEPA approved the CCA, Freeman United had addressed, to the satisfaction of IEPA, the alleged violations that were the subject of the March 11, 2005 NOV." Austin affidavit at ¶ 9. Actually, Freeman United did not *address* the violations until it performed the terms and conditions of the CCA during the following two years; achieving compliance rather than securing approval should have been the objective. Wearing his Springfield Coal hat, Mr Austin states: "It was my understanding from IEPA's representations that Springfield Coal was operating under a valid and enforceable CCA from August 30, 2007 until August 30, 2009." Austin affidavit at ¶ 17. These representations (whether admissible hearsay) apparently consisted of Mr Austin being advised (during a September 2007 telephone conversation with somebody at the Illinois EPA) that the Industry Mine should operate according to "the terms of the August 30, 2007 CCA extension request." Austin affidavit at ¶ 16.

The Board has considered *laches* in several other cases[2] but has never held that a State enforcement action was thereby barred. In effect, the Board may have previously been convinced that due diligence might have been lacking in some other case, or even that some prejudice resulted thereby, but the Board has never found that the requisite compelling circumstances were present to justify the application of the doctrine of *laches* against the People of the State of Illinois. Assuming *arguendo* that the Illinois EPA lacked due diligence during the five years preceding its referral, then Freeman United must next demonstrate that there is no genuine issue

[2] The Respondent has cited Board decisions such as *People v. Stein Steel Mills*, PCB 02-1 (April 18, 2002), but such cases merely involve adverse rulings on motions to strike affirmative defenses. These rulings have typically declined to strike defenses on the grounds that sufficient facts might be adduced at a hearing on the merits. Here, the Board must decide whether the evidentiary record demonstrates without any genuine issue of material fact the movant's claim of legal entitlement to judgment.

of material fact as to the consequential prejudice. Instead, the Respondent provides the factually unsupported assertion that it "has been prejudiced by the excessive delay." Motion at 14. In short, it seeks to show that 1) there was a lack of due diligence because the alleged delay in formal enforcement was excessive (due to the length of time) and because the Illinois EPA allegedly failed to issue any subsequent notice of violation and 2) prejudice resulted due to the allegedly excessive delay.

Here, the violator seeks to evade responsibility by claiming that the Illinois EPA fell down on the job by not enforcing the permit requirements through the issuance of a violation notice subsequent to the 2005 CCA; the Respondent fails to mention the October 2009 notice of violation (admissible through the Davis affidavit) but the document itself cannot be disputed.[3] There is no genuine issue of material fact regarding the issuance of this second Section 31(a)(1) notice. Having premised its argument upon the alleged lack of timely notice, Freeman United fails to establish the first element ("lack of due diligence by the party asserting the claim") and the Board need not reach the second element ("prejudice to the opposing party"). However, even if the Board were to somehow find that Freeman United did suffer prejudice as it has claimed (e.g., good faith belief that enforcement action would not be taken and denial of "the opportunity to work cooperatively with IEPA to address these alleged violations" [motion at 14]), the record

[3] Under the Board's procedural rules, the movant does not have the right of reply (to a response to the movant's own motion). Section 101.500(e) provides that leave to reply be allowed "to prevent material prejudice." In practice, the application of this standard seems to merely require an *assertion* of material prejudice and not any *demonstration* of such adverse impact. Here, Freeman United as the movant has made an allegation of fact, to wit: no violation notice was issued after the March 2005 notice, that has been rebutted by the State as respondent; this rebuttal might be considered by the movant to constitute "new evidence" (simply because it was not submitted with Freeman United's motion); having raised a factual issue in its motion and affidavit, and such issue having been responded to with a counter-affidavit, it is possible that Freeman United will seek leave to reply by merely claiming that a material prejudice will result. This would be unfair.

is devoid of any compelling circumstances against any public body operating in its governmental capacity.

Satisfaction of Section 31 requirements

Freeman United's Second Affirmative Defense involves the completion of a compliance commitment agreement ("CCA") and will be addressed in the next section. It makes more sense to first respond to the Respondent's allegations as to the Illinois EPA's obligations under Section 31 before specifically focusing on the CCA part of the pre-enforcement process. Freeman United's arguments in support of its Third Affirmative Defense pertain to the statutory provisions governing the compliance commitment agreement process and the Illinois EPA's alleged "failure to otherwise meet the Act's procedural pre-enforcement requirements." Freeman United's Motion at 2.

According to the Respondent's documentary exhibits, the Illinois EPA issued a violation notice to Freeman United on March 11, 2005 regarding manganese violations at Outfall 19 [Freeman exhibit 1A]; a CCA for Pond 19 was proposed on May 19, 2005 [Freeman exhibit 1B]; the Illinois EPA accepted the proposed CCA on June 16, 2005 [Freeman exhibit 1C]; on March 30, 2007 Freeman United reported on the status of Pond 19 and requested a continuation of the CCA [Freeman exhibit 1E]; on July 13, 2007 the Illinois EPA rejected Freeman United's request [Freeman exhibit 1F]; on August 14, 2007 Freeman United submitted a request to transfer its NPDES permit to Springfield Coal Company, effective September 1, 2007 [Freeman exhibit 1G]; and on August 30, 2007 Freeman United submitted another CCA proposal [Freeman exhibit 1H]. On February 10, 2010 the Attorney General filed a complaint with the Board on the Attorney General's own motion and on behalf of the Illinois EPA. Freeman United alleges that the State

failed to diligently exercise its enforcement authority during these fifty-nine months (i.e. from March 11, 2005 through February 10, 2010).

Freeman United argues that compliance with the Section 31 procedural requirements is mandatory (citing *People v. John Crane, Inc.* (May 17, 2001), PCB 01-76, slip op. at 5) and that the Illinois EPA's failure to follow these procedural requirements divests the Board of personal jurisdiction (citing *People v. Chicago Heights Refuse Depot, Inc.* (October 10, 1991), PCB 90-112, slip op. at 4). These general statements are misleading without further clarification.

The *Crane* opinion actually drew an important distinction between statutory requirements that are mandatory and those that are directory. Moreover, there is a fundamental distinction (more precisely, a qualitative difference) between the constitutional powers of the Attorney General and the legislatively delegated authority of the Illinois EPA. As a preface to its holding the Board stated:

> Section 31 of the Act provides all respondents in State enforcement actions with notice and opportunity to meet with the Agency before the Agency refers the matter to the Attorney General for enforcement. In considering the legislative history of the 1996 amendments to Section 31, the Board, on a number of occasions, has found that the amendments were not intended to bar the Attorney General from prosecuting an environmental violation. See *Eagle-Picher-Boge*, PCB 99-152; *People v. Geon* (October 2, 1997), PCB 97-62; *People v. Heuermann* (September 18, 1997), PCB 97-92.

PCB 01-76, slip op. at 5. In rejecting the contention that Section 31(a)(1) is a statute of limitations, the Board held that "while the substance of the Section 31 pre-referral process is a mandatory precondition to the Agency's referral of a matter to the Attorney General, the specific 180-day timeframe set forth in Section 31(a)(1) is directory. Accordingly, the Board is not divested of jurisdiction to hear this complaint if the Agency failed to issue the NOV, and thereby begin the pre-referral process, within 180 days of 'becoming aware' of the alleged violations."

Ibid. The concept of continuing violations was not at issue in *Crane*. This conclusion is reiterated with the following additional statement: "any failure of the Agency to issue an NOV within 180 days of becoming aware of an alleged violation does not preclude the Agency from referring the matter to the Attorney General." *Id.* at 7. Therefore, *Crane* stands for the proposition that the timely issuance of a notice of violation is a directory requirement and the lack of compliance by the Illinois EPA does not bar referral to the Attorney General, thereby further limiting the application of the *Chicago Heights Refuse Depot, Inc.* decision (which involved Section 31 prior to the 1996 amendments). More recently, the Board has unequivocally held that the Attorney General can properly bring the action on the Attorney General's own motion even if the Illinois EPA failed to follow the pre-referral procedures of Section 31. *People v. Waste Hauling Landfill, Inc. et al.*, PCB 10-9 (December 3, 2009) slip op. at 12.

The Respondent concedes that it received a notice of violation on or about March 11, 2005. Austin affidavit at ¶ 5. This violation notice [Exhibit 1A] was limited to manganese discharges from Pond 19 during 2004. The CCA proposal letter [Exhibit 1B] represented that the CCA proposal was made pursuant to Section 31(a)(5) ("If a meeting requested pursuant to subdivision (2) of this subsection (a) is held, the person complained against shall, within 21 days following the meeting or within an extended time period as agreed to by the Agency, submit by certified mail to the Agency a written response to the alleged violations" including a proposed CCA). The motion, however, mistakenly represents [at 9] that "Freeman United responded with 45 days with a proposed CCA as required by Section 31(a)(2)," citing the Austin affidavit [at ¶ 6]. In any event, the Illinois EPA timely responded with a letter dated June 16, 2005 [Exhibit 1C] that accepted the CCA proposal subject to the addition of a condition pursuant to Section

31(a)(7). None of the other procedural requirements[4] is implicated in the Respondent's arguments.

In its Third Affirmative Defense, Freeman United alleges that both the People and the Illinois EPA failed to follow the statutory requirements and that the Illinois EPA "did not provide Freeman United with a notice of violation, as required by 415 ILCS 5/31(a)(1), for all of the alleged violations contained in this complaint and therefore did not give Freeman United the opportunity to respond to IEPA regarding the alleged violations." This defense would apparently relate to allegations of the Illinois EPA's "failure to otherwise meet the Act's procedural pre-enforcement requirements," but the Motion provides little legal argument and no additional factual record. Since Freeman United conveyed ownership of the Industry Mine to Springfield Coal on September 1, 2007 [Austin affidavit at ¶ 14], Freeman United cannot complain about acts or omissions subsequent to that date.

Freeman United contends that it is undisputed "the State wholly ignored the pre-enforcement process . . . for any violations that were not addressed by the 2005 NOV" and "IEPA never issued Freeman United another NOV or otherwise provided Freeman United notice prior to referring these violations to the Attorney General to file this complaint." Motion at 10-11. The Respondent acknowledges our authority to allege violations on our own motion, and concedes that the present Complaint was in fact brought by the Attorney General "on her own motion and at the request of" the Illinois EPA. Yet, the motion for summary judgment seeks a finding that

[4] Section 31 was subsequently amended by P.A. 97-519, effective August 19, 2011 (hereinafter referenced as the "2011 amendments").

the entire action is somehow precluded because of the 2005 CCA. This claim is premised upon a prior Board decision (*People v. Chiquita Processed Foods*, PCB 02-56 (November 21, 2002)).

These factual contentions are rebutted by documents submitted with the necessary counter-affidavit. On October 8, 2009 the Illinois EPA issued a violation notice to Freeman United. The problems at the Industry Mine to the attention of the Attorney General, however, prior to the eventual referral. In fact, on December 9, 2009 the Environmental Law & Policy Center issued a notice of intent to take action under the Clean Water Act. This 60-day letter to Freeman United includes Attorney General Lisa Madigan as a recipient. An affidavit from the undersigned Assistant Attorney General is submitted to make these documents a part of the Board's record, and to address the referral issues. The substance of the Davis affidavit is that the Attorney General was first informed of the ongoing NPDES permit violations at the Industry Mine by sources other than the Illinois EPA and that Freeman United was issued a notice of violation in October 2009. Since the Respondent's contentions are rebutted by these documents, there is no genuine issue of material fact regarding the Third Affirmative Defense.

The *Chiquita Processed Foods* ruling that the Attorney General is not free to bring an enforcement action where the Agency failed to follow Section 31 of the Act before referring the case to the Attorney General was inconsistent with prevailing precedent at the time and has since not been strictly followed. The Board found that the Illinois EPA did not issue any notices of violation to Chiquita before the referral to the Attorney General. Here, Section 31(a)(1) notices were issued to Freeman United in March 2005 and October 2009 prior to the January 2010 referral. This is enough to distinguish the *Chiquita Processed Foods* decision.

As Freeman United discusses in its argument [at 12] the prefatory language in the complaints filed against Chiquita and Freeman United are substantially similar in that both actions were filed on the motion of the Attorney General and at the request of the Illinois EPA. The *Chiquita Processed Foods* decision, however, was based at least in part on an erroneous finding: "the Attorney General is bringing a complaint not on its [*sic*] own, but pursuant to a referral containing information provided by the Agency." PCB 02-56 (November 21, 2002) slip op. at 4. Since the complaint against Chiquita was explicitly brought on the Attorney General's motion and at the request of the Illinois EPA, the Board either clearly misinterpreted the plain language of that pleading or else failed to clearly articulate its ruling.[5] In any event, the *Chiquita Processed Foods* holding is limited to those cases where the lack of any violation notice is undisputed, and not to the present matter where the claim is that the CCA precludes any referral.

Application of the Compliance Commitment Agreement

The focus of Freeman United's arguments is on Section 31(a)(10) and its prohibitory language that the Illinois EPA shall not refer to the Attorney General the alleged violations that are the subject of a compliance commitment agreement performed by a violator. We admit that Freeman United mostly satisfied the terms and conditions of the CCA approved on June 16, 2005. Exhibit 1C documents the approval of the proposal and the specific terms: 1) the duration of the CCA is two years; 2) Freeman United shall provide treatment to control manganese from Pond 19, and monitor the effluent and rate of flow; and 3) Freeman United shall meet with the

[5] There are only three pleading options: a complaint may be filed by the Attorney General in the name of the People of the State of Illinois 1) on her own motion and at the request of the Illinois EPA, 2) solely on her own motion, or 3) solely at the request of the Illinois EPA. The Board may have intended its ruling (based upon a lack of any notice of violation prior to referral) to disallow options 1 and 3, and to instead allow option 2, but the statement that the Attorney General did not bring that complaint on his own motion is still wrong.

Illinois EPA at least 60 days prior to the expiration of the CCA to review the compliance status and determine whether any further action is required. This CCA did not actually require or implement any additional *treatment* although the original CCA proposal stated that "the combined treatment steps do not consistently reduce magnesium [*sic*] concentrations at the outfall of Pond 19 to meet the discharge limits. . . ." Exhibit 1B at 2.

Any controversy relates to whether the CCA had been renewed or extended (or perhaps whether a second CCA proposal were somehow approved by default). The documents show that the manganese study [Exhibit 1D] was submitted as an enclosure to the mining company's March 30, 2007 letter providing a compliance status report [Exhibit 1E]; although required by the CCA, a meeting was not held with the Illinois EPA to review the compliance status of Pond 19 and determine whether any further action is required. The March 2007 letter simply reported that the effluent from Pond 19 had continued since June 2005: "The exceedances, much less frequent than in the previous 2-year period, have occurred despite continued regular treatment of the influent to the pond and the pond itself." Exhibit 1E at 1. Lastly, *without* any explicit request for action or response by the Illinois EPA, the March 2007 letter seemingly proposed a different compliance commitment agreement. There is nothing in the letter itself to suggest that slightly different terms or compliance activities were being proposed. There is nothing to suggest that Freeman United was apparently asking that the June 2005 CCA be "extended" or that a new improved CCA was being proposed; the Austin affidavit, however, refers [at ¶ 12] to the March 2007 letter as "a proposed two-year CCA extension."

The Respondent's motion also alleges [at 2] that the compliance commitment agreement was extended on August 30, 2007 even though Mr Austin acknowledges [affidavit at ¶ 16] that

the Illinois EPA did not respond to the August 30th CCA proposal. In any event, there is no document in the record evincing agency approval. Mr Austin apparently spoke with somebody at the Illinois EPA in September 2007 and Springfield Coal "was advised by IEPA to continue to operate the Industry Mine pursuant to the terms of the August 30, 2007 CCA extension request." Austin affidavit at ¶ 16.

Information presented by an affidavit must have some indicia of admissibility in order to warrant any consideration as to the truth of any statements made by another declarant. The substance of any statements made by an unidentified person at the Illinois EPA during this conversation is inadmissible hearsay and cannot be considered (even as admissions by a party) without proper foundation (including the critical matter of the scope of authority exercised by the unknown staff on behalf of his or her agency).

In fact, Freeman United seeks to rely upon Mr Austin's affidavit to suggest detrimental reliance without the bother of a proper factual and legal context. Mr Austin states that "it was my understanding *from IEPA's representations* that *Springfield Coal was operating* under a valid and enforceable CCA from August 30, 2007 until August 30, 2009." Austin affidavit at ¶ 18, emphases added. The Complainant cannot be expected to rebut this conversation with a counter-affidavit because Mr Austin apparently does not recall who he may have spoken with in September 2007. The Board must therefore reject as *inadmissible* hearsay any statements based upon alleged representations by the Illinois EPA. Additionally, the purported 2007 CCA would not even be relevant to Freeman United due to the sale of the mine.

The Respondent admits [footnote 4] that the July 13, 2007 letter from the Illinois EPA [Exhibit 1F] explicitly stated that any subsequent proposal relating to Outfall 19 "will not be

considered to be a CCA as referenced in Section 31(a)." Yet, Freeman United argues that the August 30, 2007 (proposed by Freeman United immediately prior to the transfer of ownership on September 1, 2007) should be deemed accepted by operation of law pursuant to Section 31(a)(9) of the Act. This subsection states:

> The Agency's failure to respond within 30 days to a written response submitted pursuant to subdivision (2) of this subsection (a) if a meeting is not requested or pursuant to subdivision (5) of this subsection (a) if a meeting is held, or within the time period otherwise agreed to in writing by the Agency and the person complained against, shall be deemed an acceptance by the Agency of the proposed terms of the Compliance Commitment Agreement for the violations alleged in the written notice issued under subdivision (1) of this subsection (a) as contained within the written response.

The August 30th proposal was clearly not made pursuant to Section 31(a)(2) within 45 days after receipt of the March 11, 2005 violation notice. The August 30th proposal was also clearly not made pursuant to Section 31(a)(5) within 21 days following the meeting on the notice. Section 31(a)(9) is clearly not applicable.

There is no factual dispute on this issue because the August 30th proposal was never subject to the statutory provisions regarding approval by operation of law. Section 31 does not allow for the extension of a previously approved CCA, or allow a subsequent CCA after an initial CCA has been performed, or for the acceptance by default of any proposal other than a timely submitted CCA proposal. There is also no genuine issue of material fact so as to preclude summary judgment in favor of the People. There cannot be a factual issue as to the existence of the 2007 CCA because that last proposal simply did not qualify as a compliance commitment agreement under Section 31(a). Section 31(a)(9) does not apply to the extension or renewal of a previously approved compliance commitment agreement.

The Complainant is seeking a finding of liability on all of the manganese effluent

violations that were the subject of the 2005 CCA as well as the additional exceedances reported during the two years following acceptance of the CCA for Pond 19. Whether civil penalties are to be imposed for these particular manganese violations is a matter within the Board's discretion in the context of Sections 33(c) and 42(h) of the Act. While the June 2005 CCA was satisfied, Section 31 does not provide that penalties cannot be imposed for the violations subject to that CCA. Any legal dispute regarding monetary sanctions does not mean that the facts of the violation allegations are subject to any dispute and is not relevant to the issue of liability. This is so because, whether adjudicated after a contested hearing or through judgment on the pleadings, issues relating to penalties do not become ripe until there is a finding of liability. Therefore, any dispute (legal or factual) as to the alleged extension of the June 2005 CCA does not affect summary judgment.

In summary, the issues here for the Board's adjudication through judgment on the pleadings are purely legal. The State argues that prior to any determination as to the application of the CCA the Board must first determine whether the violations (alleged in the written notice and thereby covered by the CCA) occurred, and whether the continuing violations (reported during the two years from June 2005 through May 2007) also occurred. In other words, the factual basis for liability must be established first. A broader question of statutory interpretation arises: What does any successfully completed compliance commitment agreement actually cover? The three violations cited in the notice of violation are certainly covered, but what about the 18 manganese violations occurring during the time period of the CCA itself? The Board has apparently not yet addressed this particular issue in any enforcement case.

The Board has a sufficient record with the State's good faith acknowledgment that the

2005 CCA was successfully completed; successful completion is a concept included in Section 31(a) through the 2011 amendments. The record on this particular issue consists of portions of the Austin affidavit, Exhibits 1A through 1E, and the Complainant's factual admissions in response to Freeman United's Second Affirmative Defense. While the Respondent did not in its Answer admit any of these well-pleaded allegations [at ¶ 22 of the Complaint], the Crislip affidavit provides verified evidence that the discharges through Outfall 19 (listed in Exhibit 1A) contained manganese in excess of the maximum daily limit of 4.0 mg/L: 8.22 mg/L on September 13, 9.25 mg/L on November 15, and 20.6 mg/L on December 28, 2004. Only the violations in the March 2005 violation notice are subject to the June 2005 CCA.

Prior to the 2011 amendments, Section 31 did not explicitly refer to what was to be covered by compliance commitment agreements. Subsections (a)(2)(B) and (a)(5)(B) merely stated that such proposals are to include "specified times for achieving each commitment and which may consist of a statement indicating that the person complained against believes that compliance has been achieved." The Illinois EPA complied with the pre-2011 version of subsection (a)(7) by its timely acceptance of Freeman United's proposed CCA.

Subsection (a)(7) as amended puts the onus on the Illinois EPA to develop a CCA with terms and conditions that "are, in its discretion, necessary to bring the person complained against into compliance." Newly enacted subsections (a)(7.5) and (a)(7.6) govern the approval and implementation of a CCA. However, the latter subsection now clearly defines what is to be covered by a CCA and thereby guides the Board's adjudication. The new language makes explicit what was previously implicit: "the violations that were the subject of the Agreement." The Board must rely upon the most recent legislative revisions and clarifications where there is

no direct conflict with the prior law.

The 2011 amendments to Section 31 lend no support the argument that a completed CCA precludes enforcement by the Attorney General. In fact, the newly enacted provision at Section 31(a)(7.6) of the Act ("Successful completion of a Compliance Commitment Agreement or an amended Compliance Commitment Agreement shall be a factor to be weighed, in favor of the person completing the Agreement, by the Office of the Illinois Attorney General in determining whether to file a complaint for the violations that were the subject of the Agreement.") clearly shows that even where a violator successfully completes a CCA, the statute does not limit the Attorney General's authority to take enforcement and seek penalties, but merely directs that such conduct be considered a mitigating factor. Subsection (a)(7.6) did not become effective until August 23, 2011 and does not apply to this case. Legislative revisions are useful for purposes of statutory interpretation and clarification, especially to fix meaning to a term or phrase employed but not otherwise defined in the statutory provisions.

Here, the CCA accepted by the Illinois EPA on June 16, 2005 addressed only manganese discharges from Pond 19. Freeman United may have sought a "renewal" of this CCA but such a request is not specifically authorized by Section 31 (prior to and after the 2011 amendments) and was properly rejected by the Illinois EPA through a letter dated July 13, 2007. There is no approval by default mechanism in Section 31 for either the extension of an initial CCA or the proposal of any CCA following the completion or expiration of the initial CCA. In fact, the applicability of subsection (a)(9) is explicitly limited to any CCA proposed pursuant to subsection (a)(2) or (a)(5) in response to a subsection (a)(1) notice of violation. Exhibit 1E is a status report dated March 30, 2007 in which Freeman United also included a proposal for another

two year CCA.

The Illinois EPA responded to this letter on July 13, 2007: "The request for extension of the original Compliance Commitment Agreement (CCA) dated May 19, 2005, is hereby rejected because this request appears to only propose continuation of treatment and monitoring as in the previous CCA, and fails to set forth a plan to address the underlying issue in an attempt to arrive at an ultimate resolution [of the manganese violations]." The Illinois EPA "remains willing to evaluate any proposal" and that such a proposal should be submitted by September 1, 2007. "However, even though a proposal may be the subject of further consideration, it will not be considered to be a CCA. . . ." Exhibit 1F. This statement is legally consistent with the provisions of Section 31(a). In closing, the Illinois EPA stated that, if the violations remain the subject of disagreement, a referral for formal enforcement action may be made. This additional statement is legally consistent with subsections (a)(8) and (b).

Freeman United did submit another proposal to the Illinois EPA on August 30, 2007. Exhibit 1H. This proposal (and the subsequent lack of response by the Illinois EPA) should be viewed in the context that Freeman United had just days before notified the Illinois EPA that ownership and control were to be transferred to Springfield Coal effective September 1, 2007. Exhibit 1G. Mr Austin's belief that the 2007 CCA had been approved and transferred to Springfield Coal is not supported by any admissible evidence. Section 31 provides no authority whatsoever for the tacit approval of any proposal other than a compliance commitment agreement or for the transfer of any approved compliance commitment agreement.

The People's claims are not barred by the Doctrine of Waiver

Freeman United's Seventh Affirmative Defense alleged no facts. The motion provides a

very brief argument that the State intentionally relinquished a known right to seek enforcement and reiterates contentions (without any reference to the Austin affidavit and its exhibits, or any other factual support within the pleadings and admissions thereto) regarding awareness of the effluent problems. The argument cites to the *Crane* decision as well as *People v. QC Finishers, Inc.*, PCB 01-7 (July 8, 2004); in each case, the Board was ruling on a motion to strike an affirmative defense, not deciding the merits of the defense.

The only "fact" presented in Freeman United's argument pertains to the allegation that Illinois EPA failed to issue a notice of violation subsequent to the 2005 CCA: "There was nothing that would have precluded IEPA from issuing an NOV with respect to these alleged violations and initiating the pre-enforcement process set forth in Section 31; however, IEPA made a conscious and knowing decision not to do so." Motion at 15. Much of the Respondent's arguments is based upon this factual allegation. There is no genuine issue of material fact because the Davis affidavit provides proof of the Illinois EPA's issuance of the notice of violation in October 2009.

The October 2009 violation notice also disproves the contention that the Illinois EPA intentionally relinquished a known right. The January 2010 referral itself further rebuts this argument. The timely action by the Attorney General in response to the 60-day notice by the Environmental Law & Policy Center repudiates any notion that the Attorney General (as the party asserting the claims) was derelict in any fashion; the Complaint filed on February 10, 2010 was the result of an investigation and review of DMRs by the Attorney General after we were informed of the effluent problems at the Industry Mine in mid-December 2009. No waiver occurred.

The People's claims are not barred by the Doctrine of Estoppel

The equitable doctrine of estoppel is asserted in the Eighth Affirmative Defense but the assertion is made without any factual support. A waiver is a voluntary relinquishment of a known right, claim or privilege whereas an equitable estoppel may arise even though there was no intention on the part of the party estopped to relinquish any existing right. The Respondent agrees that it must show the six elements of the defense of equitable estoppel: 1) words or conduct by the party against whom the estoppel is alleged constituting either a misrepresentation or concealment of material facts; 2) knowledge on the part of the party against whom the estoppel is alleged that representations made were untrue; 3) the party claiming the benefit of an estoppel must have not known the representations to be false either at the time they were made or at the time they were acted upon; 4) the party estopped must either intend or expect that his conduct or representations will be acted upon by the party asserting the estoppel; 5) the party seeking the estoppel must have relied or acted upon the representations; and 6) the party claiming the benefit of the estoppel must be in a position of prejudice if the party against whom the estoppel is alleged is permitted to deny the truth of the representation made. See *Vaughn v. Speaker*, 126 Ill. 2d 150, 162 (1989). The Respondent fails to carry the burden of establishing each of these six criteria.

A party may invoke the doctrine of equitable estoppel when it "reasonably and detrimentally relies on the words or conduct of another." *Brown's Furniture v. Wagner*, 171 Ill. 2d 410, 432 (1996). The doctrine of estoppel "should not be invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." *People v. Chemetco*, PCB 96-76, slip op. at 10 (Feb. 19, 1998) (quoting *Gorgess*

v. Daley, 256 Ill. App. 3d 143, 147 (1st Dist. 1993)). The courts are necessarily reluctant to apply doctrine of estoppel against the State because it "may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials." *Brown's Furniture*, 171 Ill. 2d at 431-32; see also *Chemetco*, PCB 96-76, slip op. at 10-11 (Feb. 19, 1998).

As with *laches*, the State may be estopped when acting in its governmental capacity only under compelling circumstances. *Hickey v. Illinois Central Railroad Co.*, 35 Ill. 2d 427, 447-48 (1966). A party seeking to estop the government must prove three factors. First, it must prove that it relied on a government agency, its reliance was reasonable, and that it incurred some detriment as a result of the reliance. Second, the party must show that the government agency made a misrepresentation with knowledge that the representation was untrue. Third, "the government body must have taken some affirmative act; the unauthorized or mistaken act of a ministerial officer will not estop the government." *Chemetco*, PCB 96-76, slip op. at 11 (Feb. 19, 1998); *see also* Brown's Furniture, 171 Ill. 2d at 431, 665 N.E.2d at 806.

The words and conduct by the State that are alleged by Freeman United to constitute either a misrepresentation or concealment of material facts are as follows: the March 2005 notice of violation was limited to manganese violations; the acceptance of the 2005 CCA proposal; the failure to respond to the 2007 CCA proposal; and the failure to issue a subsequent violation notice. The last factual allegation has been disproved by our documentary evidence.

Reasonable inferences with quite different implications may be drawn from the same limited facts. These other factual allegations upon which Freeman United relies need not be as conclusively rebutted as the lack of any subsequent violation notice allegation. There is a genuine

issue of fact regarding the facts material to this last defense. By pleading its affirmative defenses, and seeking summary judgment based upon an adjudication of such defenses, the Respondent does not attack the facts underlying the 219 effluent violations alleged in Count I and verified by affidavit. Similarly, by raising a factual issue as to such defenses so as to preclude summary judgment in favor of the Respondent, the Complainant does not create or acknowledge any dispute relevant to the factual support of the effluent violations.

Freeman United cannot establish all six elements of the defense of equitable estoppel and it does not present any compelling circumstances to bar enforcement of the 219 effluent violations. The justification argument seems to be that Freeman United relied upon the Illinois EPA's lack of attention to the Industry Mine between August 2007 (when it received but failed to respond to Freeman United's last proposal for the mine) and October 2009 (when it issued another violation notice). The Respondent's defense fails because the State may be estopped when acting in its governmental capacity *only under compelling circumstances.* The Respondent does not show that Illinois EPA made a misrepresentation with knowledge that the representation was untrue. There is no further showing that its reliance on the Illinois EPA's lack of attention was reasonable and that it incurred some detriment as a result of the reliance; Freeman United sold the mine and incurred no detriment.

Conclusion

While the Complainant timely objected to the factual and legal insufficiency of these affirmative defenses, Freeman United does not attempt to cure these pleading deficiencies through its Motion for Partial Summary Judgment and the evidentiary attachments. By asserting its affirmative defenses as grounds for summary judgment, the Respondent not carried its burden

of proving the facts alleged in the affirmative defenses.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN,
Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____
THOMAS DAVIS, Chief
Environmental Bureau
Assistant Attorney General

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Springfield, Illinois 62706
217/782-9031
Dated: 6/18/12

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
ENVIRONMENTAL LAW AND POLICY CENTER, on behalf of PRAIRIE RIVERS NETWORK and SIERRA CLUB, ILLINOIS CHAPTER,	)	
	)	
Intervenor,	)	
	)	
v.	)	**PCB Nos. 2010-061 & 2011-002 (Water-Enforcement)**
	)	
FREEMAN UNITED COAL MINING COMPANY, LLC, a Delaware limited liability company, and SPRINGFIELD COAL COMPANY, LLC, a Delaware limited liability company,	)	
	)	
Respondents.	)	

AFFIDAVIT OF THOMAS DAVIS

Upon penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that I verily believe the same to be true:

1. I am employed by the Illinois Attorney General's Office, as an Assistant Attorney General. Since September 1, 1991 I have served as the Bureau Chief of the Environmental Bureau/Springfield.

2. On December 10, 2009 the Attorney General's Office received a copy of a December 9, 2009 letter from the Environmental Law & Policy Center and directed to the

Freeman United Coal Mining Company; the copy was sent to Attorney General Lisa Madigan and forwarded to my attention. This letter (minus the appendix which had listed discharge violations at the Industry Mine since January 2005) is attached as an exhibit to this affidavit. The letter was intended as a 60-day notice under the Clean Water Act; copies were directed to the Illinois EPA and the federal EPA. After review of the letter, I requested copies of the discharge monitoring reports (DMRs) dating back to the beginning of 2004; this request was made of agency counsel for the Illinois EPA in mid-December 2009 and copies of the requested DMRs for the preceding six years were provided to me over the next several weeks. I began drafting a complaint after my initial receipt of the DMRs; our internal docketing records indicate that a case was opened on our own initiative regarding Freeman United on January 5, 2010. I submitted the draft complaint for review and approval to file; this was accomplished prior to my receipt of any enforcement referral from the Illinois EPA.

3. My work to investigate the problems at the Industry Mine and to draft pleadings represents the exercise of my delegated authority and prosecutorial discretion, and my references to these activities in this affidavit are intended to provide a chronology and background regarding circumstances relating to the enforcement referral by the Illinois EPA against Freeman United. This affidavit and my representations are also intended to provide admissible documents into the record. The term "enforcement referral" means a formal request from the Illinois EPA for legal representation by the Attorney General to enforce violations of the Act. The typical enforcement referral conveys the results of investigation, cites applicable requirements, alleges potential violations, and requests necessary relief including technical remedy and civil penalty. The Attorney General's acceptance of any request for legal representation and any associated

enforcement referral is discretionary. The Attorney General is not restricted to any particular allegations of violation as might be provided in a referral but may on her own motion prosecute any additional or alternative claims. Any referral is a written communication clearly subject to the attorney-client privilege. My attestations of fact herein do not reveal the substance of any attorney-client privileged communications that I have made or received and I do not waive any claim of such privilege. I am mindful of my obligations under the Rules of Professional Responsibility and declare that it is unlikely my testimony would be necessary on any of the collateral matters herein.

4. The Freeman United enforcement referral from the Illinois EPA was dated January 22, 2010 and received at the Attorney General's Office on January 25, 2010; our internal docketing records indicate that a case was opened upon agency referral regarding Freeman United on January 26, 2010. The referral included Violation Notice W-2009-00306 issued to Freeman United on October 8, 2009 and the November 16, 2009 response thereto sent to the Illinois EPA by the Springfield Coal Company; a copy of Violation Notice W-2009-00306 is attached as an exhibit to this affidavit. The response to the violation notice mentioned Springfield Coal's purchase of the Industry Mine and the request to transfer the NPDES permit. The Freeman United referral pertained only to the violations cited in Violation Notice W-2009-00306. The referral did not include any other violation notice. The referral did not cite any violation prior to 2009. The referral also did not mention the 2005 compliance commitment agreement.

/s/_____
THOMAS DAVIS

Dated: June 18, 2012

ENVIRONMENTAL LAW & POLICY CENTER

Protecting the Midwest's Environment and Natural Heritage

December 8, 2009

BY CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Bill Richter, Manager
Freeman Coal Industry Mine
1480 E. 1200th St.
P.O. Box 260
Industry, IL 61440

Thomas A. Korman, Illinois Agent
Freeman United Coal Mining Co., LLC
222 N. Lasalle St.
800
Chicago, IL 60601

RE: Notice of Intent to Sue for Violations of the Clean Water Act

To Whom It May Concern:

I am writing on behalf of the Sierra Club, its individual members, the Prairie Rivers Network, its individual members, and Environmental Law & Policy Center (collectively, the "Claimants"), whose members reside and recreate near and around the Freeman Coal United Mine located in McDonough and Schuyler Counties approximately 5 miles southwest of Industry, Illinois ("the Industry Mine") and the waters into which the Industry Mine discharges its wastewater, including Grindstone Creek, Willow Creek, Camp Creek, and their unnamed tributaries ("the Receiving Waters"). These members are adversely affected by pollution from the Mine. This letter constitutes Claimants' notice of intent to sue for violations of the Clean Water Act resulting from the facility's operation in violation of the law. The violations upon which this notice letter is based are more fully set forth below.

Claimants have reason to believe that Freeman United Coal Mining Co., LLC ("Freeman Coal" or "the Company") has repeatedly violated, and will continue to violate (1) Section 301(a) of the federal Clean Water Act, 33 U.S.C. § 1311(a); and (2) the Industry Mine's National Pollutant Discharge Elimination System ("NPDES") Permit No. IL0061247 at the Industry Mine. Among other violations, Freeman Coal has discharged wastewater with illegal levels of several pollutants into the Receiving Waters.

More specifically, Freeman Coal has routinely discharged wastewater from its operations of the Industry Mine containing iron, manganese, sulfates, pH, and total suspended solids at levels in violation of the levels allowed by its NPDES permit. The specific limits for these parameters, and the Industry Mine's repeated violations, are discussed below. Freeman Coal has also violated the reporting and monitoring requirements of its NPDES permit numerous times, and has discharged water containing high levels of sulfates into Grindstone Creek and its unnamed tributaries, which are listed by Illinois as having impaired water quality due to sulfates, in violation of Special Condition No. 1 of NPDES Permit No. IL0061247.

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Harry W. Drucker – Chairperson Howard A. Learner – Executive Director

PERMIT LIMITS

Iron
The NPDES permit as modified July 21, 2003, contains concentration limits of 3.5 mg/L (30 day average) and 7.0 mg/L (daily maximum) for outfalls 002, 003, 009, 018, 019, 020, 021, 022, 024W, 026, 029, 030, 031, 032, 033, and 035.

Manganese
The NPDES permit as modified July 21, 2003, contains concentration limits of 2.0 mg/L (30 day average) and 4.0 mg/L (daily maximum) for total manganese discharged from outfalls 002, 003, 009, 018, 019, 020, 021, 022, 024W, and 026.

Total Suspended Solids
The NPDES permit as modified July 21, 2003, contains concentration limits of 35.0 mg/L (30 day average) and 70.0 mg/L (daily maximum) for total suspended solids discharged from outfalls 002, 003, 009, 018, 019, 020, 021, 022, 024W, 026, 029, 030, 031, 032, 033, and 035.

pH
The NPDES permit as modified July 21, 2003, contains a pH limit of no lower than 6.0 and no higher than 9.0 for all outfalls.

Sulfates
The NPDES permit as modified July 21, 2003, contains the following limits for sulfates:

Outfall(s)	Concentration Limits (Daily Maximum mg/L)
002	1100
003, 009	1100
018, 019	1800
020, 021, 022, 024W, 026	500
029, 030, 031, 032, 033, 035	1100
004, 008, 027	500
006	1100
005, 007, 010, 011	1800

VIOLATIONS

The violations referred to above include, but are not limited to those listed in the attached Appendix. There have been over 300 exceedances of the Industry Mine NPDES permit since the permit modification date in July 2003, as shown by the U.S. EPA Integrated Compliance Information System – National Pollutant Discharge Elimination System (ICIS-NPDES), based on monitoring data reported by the Industry Mine on its monthly Discharge Monitoring Reports (DMRs). Each of the discharges represents a violation of: (1) the federal Clean Water Act, 33 U.S.C. § 1311(a); and (2) NPDES Permit No. IL00612247. There have also been numerous monitoring and reporting violations since July 2003, as well as violations of Special Condition 1.

This notice letter is based on publicly available information. Additional information, including information in Freeman Coal's possession, may reveal additional violations. This letter covers all such violations occurring within five years immediately preceding the date of this notice letter.

Claimants plan to file suit against Freeman Coal in federal court under the Clean Water Act, 33 U.S.C. § 1365, to secure appropriate relief for these violations. In so doing, Claimants seek to improve the water quality of the Receiving Waters by securing long-term compliance with applicable law.

Should you or your attorney wish to discuss this matter, please feel free to contact me at the address and phone number listed below.

Sincerely,

Jessica Dexter
Staff Attorney, Environmental Law & Policy Center
35 E Wacker Drive Suite 1300
Chicago, IL 60601
312-795-3747

Legal counsel for:

Sierra Club, Illinois Chapter
70 E. Lake St., Ste. 1500
Chicago, IL 60601
312-251-1680

Prairie Rivers Network
1902 Fox Drive Suite G
Champaign, IL 61820
217-344-2371

cc: Lisa Jackson, Administrator, U.S. Environmental Protection Agency
Bharat Mathur, Acting Region V Administrator, U.S. Environmental Protection Agency
Douglas P. Scott, Director, Illinois Environmental Protection Agency
Lisa Madigan, Attorney General, Illinois
Michael W. Toner, President, Freeman United Coal Mining Company, LLC

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 • (217) 782-2829
James R. Thompson Center, 100 West Randolph, Suite 11-300, Chicago, IL 60601 • (312) 814-6026

PAT QUINN, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

217/782-9720

CERTIFIED MAIL # 7008 1830 0001 4719 7152
RETURN RECEIPT REQUESTED

October 8, 2009

Freeman United Coal
P.O. Box 260
Industry, IL 61440

Re: Violation Notice: W-2009-00306
Facility I.D.: IL0061247 – Freeman United Coal - Industry

Dear Facility Owner:

This constitutes a Violation Notice pursuant to Section 31(a)(1) of the Illinois Environmental Protection Act, 415 ILCS 5/31(a)(1), and is based upon review of available information and investigation by representatives of the Illinois Environmental Protection Agency ("Illinois EPA").

The Illinois EPA hereby provides notice of violations of environmental statutes, regulations or permits as set forth in Attachment A to this letter. Attachment A includes an explanation of the activities that the Illinois EPA believes may resolve the specified violations, including an estimate of a reasonable time period to complete the necessary activities. However, due to the nature and seriousness of the violations cited, please be advised that resolution of the violations may also require the involvement of a prosecutorial authority for purposes that may include, among others, the imposition of statutory penalties.

A written response, which may include a request for a meeting with representatives of the Illinois EPA to be held at an Illinois EPA facility, must be submitted via certified mail to the Illinois EPA within 45 days of receipt of this letter. The response must address each violation specified in Attachment A and include for each, an explanation of the activities that will be implemented and the time schedule for the completion of each activity. Also, if a pollution prevention activity will be implemented, indicate that intention in any written response. The written response will constitute a proposed Compliance Commitment Agreement ("CCA") pursuant to Section 31 of the Act. The Illinois EPA will review the proposed CCA and will accept or reject the proposal within 30 days of receipt.

If a timely written response to this Violation Notice is not provided, it shall be considered a waiver of the opportunity to respond and meet, and the Illinois EPA may proceed with a referral to the prosecutorial authority.

Written communications should be directed to BEVERLY BOOKER at the ILLINOIS EPA, BUREAU OF WATER, CAS #19, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276. All communications must include reference to this Violation Notice number, W-2009-00306.

Questions regarding this Violation Notice should be directed to ROGER CALLAWAY at 217/782-9720.

Sincerely,

Michael S. Garretson, Manager
Compliance Assurance Section
Bureau of Water

Attachment

bcc: Roger Callaway
Beverly Booker
Bruce Yurdin
Peoria Region, WPC
Connie Tonsor, DLC
Div. of Legal Counsel
Marion Region, MPCP
Token Nolder
Records Unit

ATTACHMENT A

IL0061247

FREEMAN UNITED COAL - INDUSTRY **VIOLATION NOTICE: W-2009-00306**

Questions regarding the violations identified in this attachment should be directed to ROGER CALLAWAY at (217) 782-9720.

A review of information available to the Illinois EPA indicates the following violation of statutes, regulations or permits. Included with the violation is an explanation of the activity the Illinois EPA believes may resolve the violation including an estimated time period for resolution.

Effluent Violations

Review the treatment plant operations/operational procedures and evaluate the treatment equipment in order to correct the deficiencies which caused the violations. Compliance is expected to be achieved within 30 days.

Violation Date	**Violation Description**
03/31/2009	024W Effluent – Sulfate, Total (as SO4) Effluent Limit
Rule/Reg.:	Section 12(a) and (f) of the Act, 415 ILCS 5/12(a) and (f) (2008), 35 Ill. Adm. Code 304.125, 304.141(a), NPDES Permit
03/31/2009	018 Effluent – Manganese, Total (as MN) Effluent Limit
Rule/Reg.:	Section 12 (f) of the Act, 415 ILCS 5/12(f) (2008), 35 Ill. Adm. Code 305.102(a) and (b), NPDES Permit
03/31/2009	026 Effluent – Manganese, Total (as MN) Effluent Limit
Rule/Reg.:	Section 12 (f) of the Act, 415 ILCS 5/12(f) (2008), 35 Ill. Adm. Code 305.102(a) and (b), NPDES Permit
03/31/2009	024W Effluent – Manganese, Total (as MN) Effluent Limit
Rule/Reg.:	Section 12 (f) of the Act, 415 ILCS 5/12(f) (2008), 35 Ill. Adm. Code 305.102(a) and (b), NPDES Permit
04/30/2009	024W Effluent – Sulfate, Total (as SO4) Effluent Limit
Rule/Reg.:	Section 12(a) and (f) of the Act, 415 ILCS 5/12(a) and (f) (2008), 35 Ill. Adm. Code 304.125, 304.141(a), NPDES Permit
04/30/2009	009 Effluent – Manganese, Total (as MN) Effluent Limit
Rule/Reg.:	Section 12 (f) of the Act, 415 ILCS 5/12(f) (2008), 35 Ill. Adm. Code 305.102(a) and (b), NPDES Permit

ATTACHMENT A

IL0061247

FREEMAN UNITED COAL - INDUSTRY **VIOLATION NOTICE: W-2009-00306**

04/30/2009 018 Effluent – Manganese, Total (as MN)
Effluent Limit
Rule/Reg.: Section 12 (f) of the Act, 415 ILCS 5/12(f) (2008),
35 Ill. Adm. Code 305.102(a) and (b), NPDES Permit

04/30/2009 019 Effluent – Manganese, Total (as MN)
Effluent Limit
Rule/Reg.: Section 12 (f) of the Act, 415 ILCS 5/12(f) (2008),
35 Ill. Adm. Code 305.102(a) and (b), NPDES Permit

04/30/2009 026 Effluent – Manganese, Total (as MN)
Effluent Limit
Rule/Reg.: Section 12 (f) of the Act, 415 ILCS 5/12(f) (2008),
35 Ill. Adm. Code 305.102(a) and (b), NPDES Permit

05/31/2009 026 Effluent – Sulfate, Total (as SO4)
Effluent Limit
Rule/Reg.: Section 12(a) and (f) of the Act, 415 ILCS 5/12(a) and (f) (2008),
35 Ill. Adm. Code 304.125, 304.141(a), NPDES Permit

05/31/2009 019 Effluent - pH
Effluent Limit
Rule/Reg.: Section 12(a) and (f) of the Act, 415 ILCS 5/12(a) and (f) (2008),
35 Ill. Adm. Code 304.125, 304.141(a), NPDES Permit

06/30/2009 019 Effluent – Sulfate, Total (as SO4)
Effluent Limit
Rule/Reg.: Section 12(a) and (f) of the Act, 415 ILCS 5/12(a) and (f) (2008),
35 Ill. Adm. Code 304.125, 304.141(a), NPDES Permit

06/30/2009 026 Effluent – Sulfate, Total (as SO4)
Effluent Limit
Rule/Reg.: Section 12(a) and (f) of the Act, 415 ILCS 5/12(a) and (f) (2008),
35 Ill. Adm. Code 304.125, 304.141(a), NPDES Permit